

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-5015

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-5015

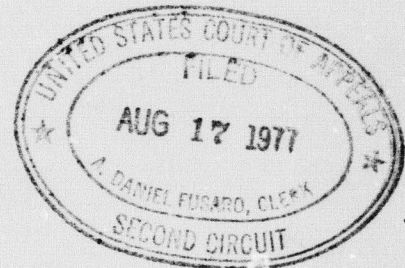
In the Matter

of

DYNAMICS CORPORATION OF AMERICA,

Debtor.

(No. 72 B 750)



HOOS & CO.,

Claimant-Appellant,

vs.

DYNAMICS CORPORATION OF AMERICA,

Debtor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(No. 72 B 750)

BRIEF OF CLAIMANT-APPELLANT HOOS & CO.

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August 16, 1977

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BRIEF OF CLAIMANT-APPELLANT
HOOS & CO.

Claimant Hoos & Co. appeals from the order entered on May 17, 1977 by the United States District Court for the Southern District of New York (Hon. Charles E. Stewart, Jr.), which denied and dismissed the appeal of claimant Hoos & Co. from the February 11, 1977 order of the Bankruptcy Court

(Hon. Edward J. Ryan), which had denied its application for allowance of a claim with respect to \$200,000 principal amount of the registered notes of the debtor.

The Issues Presented for Review

1. When, in response to the written request of the Secretary of the Creditors Committee, the claimant submits to the Secretary, within five weeks of the filing of the debtor's petition, a letter with accompanying proof of claim form that together describe claims with respect to \$500,000 of the debtor's registered notes, was it error for the Bankruptcy Court to allow only the claim for \$300,000 set forth in claimant's letter and accompanying form, but to deny the claim for \$200,000 set forth in claimant's letter?

2. Is the filing with the Secretary of the Creditors Committee of a claim executed by an authorized agent of the claimant, in response to the written request and representation of the Secretary that such claims will be filed with the Court, a delivery to a person authorized to receive and forward such claims, so as to constitute a valid filing under Bankruptcy Rule 509(c)?

3. Is the amendment of Section 355 of the Bankruptcy Act, which, in order to avoid the effect of intentional or inadvertent inaccuracies in the debtor's

accounts, for the first time required the filing of a proof of a claim by creditor in a Chapter XI proceeding, properly applied to bar a claim with respect to an undisputed debt represented by registered notes of the debtor, where the holder of the notes has submitted a written claim for filing with the Court, and where the principal part of the claim thus submitted has been allowed and paid?

STATEMENT OF THE CASE

The present case involves a claim with respect to \$200,000 of the registered notes of the debtor, acquired on behalf of the Carrier Corporation Retirement Trust in 1968 in a private placement in which only 10 purchasers participated. Since their purchase, these notes ("the Carrier notes") have been registered in Hoos & Co., a nominee of Marine Midland Bank (a-8).*

Pursuant to a plan of arrangement under Chapter XI confirmed in November, 1974, the debtor was relieved of its obligation with respect to 71-1/2% of the principal amount of its scheduled debts, with unsecured creditors receiving payment of only 28-1/2% of their claim, in addition to a stock dividend.

* References to the Joint Appendix are cited (a-).

The denial by the Courts below of the claim of Hoos & Co. to recover this 28-1/2% dividend with respect to a registered debt of \$200,000, scheduled by the debtor within five weeks of the filing of its Chapter XI petition, inequitably allows the debtor to avoid payment of any part of an undisputed, registered debt, in contradiction of equitable principles long recognized by the Supreme Court and by this Court, and thus results in an "undeserved windfall" to the debtor (see infra p. 29) in conflict with the standards and policies of Section 355 of the Bankruptcy Act.

A. Summary of Proceedings

The debtor Dynamics Corporation of America filed its petition for an arrangement under Chapter XI of the Bankruptcy Act on August 2, 1972. On September 8, 1972 a partner of the claimant submitted to the Secretary of the Creditors Committee, for filing with the Court, claims with respect to \$500,000 of the debtor's registered notes (including the \$200,000 of notes at issue in this appeal). The claims consisted of an executed proof of claim form, which listed \$300,000 of the notes, and an accompanying letter of transmittal which listed an additional \$200,000 of the notes. Schedules filed by the debtor on October 5, 1972 listed the full \$500,000 of the notes to which these claims related (a-39).

Following confirmation of the debtor's plan of arrangement in November, 1974, a full distribution was made on the claim to the \$300,000 of notes listed on the proof of claim form (a-111), but no payment was made on the claim to the additional \$200,000 of registered notes identified in the September 8, 1972 letter. (The letter and accompanying form are attached as Exhibit A.)

On June 16, 1975 Hoos & Co. moved for allowance of its claim with respect to the remaining \$200,000 of the debtor's registered notes. After hearing argument on November 5, 1975, the Bankruptcy Court (Hon. Edward J. Ryan) issued an oral opinion denying the claimant's application (a-102-04). On February 11, 1977, the Bankruptcy Court entered findings of fact, conclusions of law and an order denying the claimant's application for allowance (a-105). On May 17, 1977, the District Court (Hon. Charles E. Stewart, Jr.) issued an oral opinion and order denying and dismissing claimant's petition for review of the February 11, 1977 order of the Bankruptcy Court. Claimant filed its notice of appeal to this Court on June 16, 1977 (a-128).

B. Facts

On September 1, 1968, the debtor Dynamics Corporation of America privately placed with ten purchasers \$10 million of its notes due 9/1/88. Marine Midland Bank-New

York ("Marine Midland-New York"), purchased a total of \$500,000 of these notes, \$200,000 of which were to be held for the benefit of the Carrier Corporation Retirement Trust. These notes ("the Carrier notes"), which were registered in Marine-Midland's nominee Hoos & Co., are the subject of this appeal. (Affidavit of Theodore J. Lipp, June 11, 1975, par. 2 (the "Lipp affidavit" (a-6))).

Marine Midland-New York served jointly with Marine Midland Bank-Central ("Marine Midland-Central") as co-trustees of the Carrier Trust until January 1972, when Marine Midland-Central became the sole trustee. In March 1972, the assets of the Carrier Trust were physically delivered to Marine Midland-Central, and most of the securities in the trust were thereafter re-registered in Marine Midland-Central's nominee, Carsec & Co. It was understood by officers of Marine Midland-New York and Marine Midland-Central that the Carrier notes were re-registered in Marine Midland-Central's nominee, Carsec & Co., but such re-registration, in fact, was never effected. (Lipp affidavit, par. 6; Affidavit of Ronald S. Hummel, June 5, 1975, par. 2 (the "Hummel affidavit") (a-8, 20)). Thus, at the time the debtor filed its petition on August 2, 1972, the Carrier notes remained registered in Hoos & Co., the nominee of Marine Midland-New York.

At the time of the filing of the debtor's petition, Marine Midland-New York held, in other trust and custodian

accounts, the additional \$300,000 of the of notes originally purchased in 1968, \$200,000 of which were registered in the name of Hoos & Co., and \$100,000 registered in another nominee of Marine Midland-New York, Jaquith & Co. (Lipp affidavit, par. 2 (a-6)).

On September 7 or 8, 1972, Theodore J. Lipp, then a Pension Trust Officer of Marine Midland-New York, received a letter from Stanley Tulchin, Secretary of the Creditors Committee, addressed "To the Creditors of: Dynamics Corporation of America/72 B 750" which, on behalf of the Creditors Committee, requested "your executing the enclosed Proof of Claim in order that your claim may be filed with the Referee." The letter further requested that the proof of claim be returned "promptly so that we will have it in time for the next meeting scheduled for September 11, 1972 before the Referee in Bankruptcy." (Lipp Affidavit, Ex. A, (a-13)).

With his letter of September 8, 1972 to Stanley Tulchin, Theodore Lipp returned the executed proof of claim form of Marine Midland-New York in regard to \$200,000 of notes of the debtor registered in Hoos & Co. and the \$100,000 of such notes registered in Jaquith & Co. (Ex. A, a-3) In addition, the letter advised Mr. Tulchin that "earlier this year" the Carrier notes had been transferred to a "successor trustee, namely Marine Midland-Central and are presently in their nominee of Carsec & Co." Mr. Lipp

stated he "was not a partner of Carsec & Co." but "would appreciate your including this claim with ours, since the timing of your meeting Monday does not make it possible to get you their proof of claim."*

By letter of December 31, 1973, Patrick Dorme, Controller of the debtor, requested that Marine Midland-New York furnish to the debtor's Court appointed auditors, S.D. Leidesdorf & Co., "information regarding our indebtedness to you . . . in connection with the examination of our accounts."

(a-17) By letter of March 12, 1974, Mr. Fred W. Hildum, Trust Operations Officer of Marine Midland-New York, replied to the December 31, 1973 letter from Mr. Dorme, identifying \$300,000 principal amount of notes of debtor held by Hoos & Co. and Jaquith & Co., nominees of Marine Midland-New York. (a-19)

The March 12, 1974 letter from Mr. Hildum did not refer to the Carrier notes then registered in Hoos & Co., since in September 1973, Bankers Trust Company had replaced Marine Midland-Central as trustee of the Carrier Trust and thereafter the assets of the trust (including the Carrier notes) had been transferred to Bankers Trust. (Findings of Fact, pars. 15, 16 (a-109-110)).

* This statement reflected the mistaken belief that re-registration in the name of Carsec & Co. had been effected when, in fact, the notes were then, and have remained to this day, registered in the name of Hoos & Co.

At the time Mr. Hildum's letter was transmitted to the accountants for the debtor, the schedules of the debtor indicated that \$500,000 principal amount of the 9/1/88 notes of the debtor were registered in the name of Marine Midland-New York or its nominees, rather than \$300,000 principal amount as indicated in Mr. Hildum's letter of March 12, 1974. The Bankruptcy Court below specifically found that "neither S.D. Leidesdorf nor the debtor advised Marine Midland-New York of this discrepancy." (Findings of Fact, par. 17 (a-110)).

After it replaced Marine Midland-Central as trustee of the Carrier Trust, Bankers Trust requested the debtor to re-register the Carrier notes with its nominee (Findings of Fact, par. 15 (a-109)), but the debtor did not effect such re-registration. Bankers Trust has asserted that because of its inability to re-register the notes, it did not receive notice that, upon the entry of an order on November 27, 1974 approving the debtor's plan of arrangement, anyone who had not previously filed a proof of claim could do so by December 27, 1974 (a-10). Bankers Trust filed no proof of claim to the Carrier notes, either before or after December 27, 1974, but in April 1975, asked Marine Midland-New York to seek, through its nominee Hoos & Co., allowance of the claim with respect to the Carrier notes (a-11). Claimant's application for allowance was filed on June 16, 1975 (a-4).

C. The Bankruptcy Court's Conclusions of Law

The conclusions of law entered by Judge Ryan on February 11, 1977 (a-112) incorporated his oral rulings of November 5, 1975 (a-102-04).

First, the Court concluded that although the September 8, 1972 letter from a partner of Hoos & Co. (Mr. Lipp) to the Secretary of the Creditors Committee (Mr. Tulchin) referred to the \$200,000 principal amount of the notes of debtor at issue, the letter does not set forth "an explicit demand against the estate" of the debtor, which the Court held is required in an informal proof of claim. Accordingly, Judge Ryan found (a-102) that the September 8, 1972 letter "was not an effective proof of claim" because the letter supposedly failed to comply with the requirements of Bankruptcy Rule 301, made applicable to Chapter 11 proceedings by Bankruptcy Rule 11-33(a).

Second, Judge Ryan concluded that even if a proper proof of claim -- meeting all requirements of the applicable rules -- had been sent to the Secretary of the Creditors Committee, with a request that it be forwarded to the Court, the Secretary of the Creditors Committee "is the agent of the creditors, not the agent of the Court, nor the agent of the debtor". Accordingly, the Court held that the delivery of Mr. Lipp's letter of September 8, 1972 to the Secretary

of the Creditors Committee was not delivered to a person authorized to receive and forward such claims, and thus did not constitute a valid filing under Bankruptcy Rule 509(c) (a-102-03).

D. The Opinion of the District Court

Judge Stewart, recognizing the applicability of the prior rulings of this Court, did not accept the Bankruptcy Court's conclusion that the September 8, 1972 letter was insufficient in form to constitute a claim against the debtor (a-123). Nevertheless, while indicating that the prior decisions of this Court would otherwise permit allowance of the claim in question, the Court determined that under Bankruptcy Rule 509(c), delivery of a valid claim to the Secretary of Creditors Committee was not a delivery to a person specifically enumerated in that rule, and therefore did not constitute a valid filing thereunder. The District Court discounted the fact that Mr. Tulchin had solicited and received the claims for transmittal to the Court, finding that such activities of the Secretary "were perfectly proper as a 'function in the interests of creditors'" but that such receipt and filing of claims "was a courtesy on behalf of the creditors and not a duty." (a-125)

the Bankruptcy Court had ruled as a matter of law, and exercised no discretion, in concluding that

delivery to the Secretary of the Creditors Committee could not constitute a valid filing under Rule 509(c) (a-112), the District Court ruled "that to the extent it is a discretionary matter within the Bankruptcy Court as to whether a misdelivery under Rule 509(c) shall constitute a valid [filing], the bankruptcy judge did not abuse his discretion in this case." (a-126)

SUMMARY OF ARGUMENT

At the time of the filing of the debtor's petition, nominees of Marine Midland Bank-New York held \$500,000 of the registered notes issued by the debtor. Within 5 weeks of the filing of the debtor's petition, a trust officer of the bank submitted to the Secretary of the Creditors Committee claims to the full \$500,000 of these notes; the claims consisted of an executed claim form (which listed \$300,000 of the notes) and an accompanying letter of transmittal which asserted claims to an additional \$200,000 of the debtor's notes.

Within one month thereafter, the schedules filed by the debtor in this proceeding listed the full \$500,000 of such notes.

While allowing and authorizing payment of the \$300,000 of the total claim referred to in the proof of claim form, the Courts below denied allowance of the claim to the remaining \$200,000 of the notes described in the

accompanying letter of transmittal. The denial of this related, substantial claim is a harsh, unnecessary and inequitable result, inconsistent with the Bankruptcy Act and with prevailing authority in this Circuit. The order of the District Court should be reversed because of its fundamental error in each of the following respects.

First, the letter and accompanying form together constituted a unified claim, whose validity has been conceded by the payment of the part of the claim to \$300,000 of the debtor's notes. The Court without justification allowed only this part of the claim, and improperly denied the equally valid claim to the other \$200,000 of the debtor's notes.

Second, even if viewed as a separate document, the letter of transmittal, which the District Court recognized as a sufficient claim, was timely as well, since it was filed in September 1972 with a person -- the Secretary of the Creditors Committee -- who had apparent and actual authority to act as an intermediary between the creditors and the Court, in order to transmit such claims to the Referee. Therefore, the filing of the claim with the Secretary, in response to his request and representation that claims would be filed with the Court, constituted a valid, timely filing under Bankruptcy Rule 509(c).

ARGUMENT

I

THE SEPTEMBER 8 LETTER AND
ACCOMPANYING FORM CONSTITUTE
A UNIFIED CLAIM WHICH CANNOT
BE ALLOWED IN PART AND DENIED
IN PART

The obligations which underly this appeal are \$500,000 of the debtor's registered notes. The courts below allowed the claim with respect to \$300,000 of these notes, but denied allowance of the claim to \$200,000 of the notes, although this claim had been submitted at the same time, in a single envelope, to the Secretary of the Creditor Committee for filing with the Court. The claim to \$300,000 of notes was set forth on an official proof of claim form, and the claim to \$200,000 of notes in a letter which accompanied the official form. The claim to the two groups of notes should have been treated as a unified claim and the full claim of \$500,000 allowed.

The text of the September 8 letter and accompanying proof of claim form (Exhibit A), and the circumstances surrounding their submission establish that both documents were to be transmitted and considered together. Pursuant to the Secretary's representation that he would file claims with the Court (a-13), both documents were submitted to

him at the same time, and in the same envelope. Moreover, the maturity and rate of interest of all of the \$500,000 of notes are described only in the September 8 letter and not in the official proof of claim form. Likewise, Mr. Lipp's reference in the September 8 letter to the Secretary's "including this claim with ours" further demonstrates that the letter and claim form were not to be treated separately.

Finally, debtor itself treated the full \$500,000 as a unified claim in the schedule of indebtedness filed in this proceeding on October 5, 1972, within one month of Mr. Lipp's submission of the letter and accompanying claim form. (Debtor's Schedule A-3, October 5, 1972 (a-39)).

In denying allowance of the claim to the remaining \$200,000 of such notes, the Courts simply sidestepped claimant's showing that the letter and accompanying form constituted a unified claim.

Indeed, the District Court did not even rule upon that point, principally because it misread the decision of the Bankruptcy Court. Thus, noting claimant's contention that the claims to \$300,000 and \$200,000 of the debtor's notes "were set forth in one unified proof of claim -- the September 8, 1972 letter from Mr. Lipp and the proof of claim form which accompanied the letter", Judge Stewart concluded (a-123) that "on this issue, the Bankruptcy judge disagreed, finding

that the letter was not a proper proof of claim form." (emphasis added). However, the conclusions of law of the Bankruptcy Court (as cited by Judge Stewart) make clear that it did not specifically address claimant's contention that the letter and form constituted a unified claim, but instead ruled only that the letter considered separately was not a proper proof of claim form. It is clear that the Bankruptcy Court, although directly urged to do so (a-48-49), made no finding whether the form and letter together constituted a unified claim, and considered only the validity of the letter and the manner of its filing.

The conclusion of the Bankruptcy Court, itself erroneous, that the letter does not constitute a sufficient proof of claim, sidesteps the underlying issue whether the letter and claim form together constituted a unified claim to \$500,000 of the debtor's notes. The District Court did not accept the Bankruptcy Court's ruling that the letter itself was not a sufficient form of claim, but ruled (a-123) that the Bankruptcy Court "was correct in his conclusion that delivery of the letter to Mr. Tulchin [the Secretary of the Creditors Committee] did not constitute a filing within the meaning of Bankruptcy Rule 509" (emphasis added). While this conclusion of the District Court was, we submit, erroneous with respect to the delivery of the letter itself (see Point II, infra), this ruling, like that of the

Bankruptcy Court, again fails to address the fundamental question -- whether the letter and form together constituted a unified claim. Whatever the scope of Rule 509 in other circumstances, the substantial part of the claim which was filed with the Secretary, and transmitted to the Court, has been allowed and paid. The undisputed facts establish that the claim was in fact an integrated single claim, but the Bankruptcy Court and District Court ignored this fundamental predicate of claimants' position, made no findings or conclusions on this point, and erroneously denied allowance of the claim in full.

Appellant submits that as a fact of equity, its unified claim to the \$500,000 of notes, scheduled by the debtor within a month of the filing of this claim (a-39), cannot be arbitrarily separated, but should be recognized for what it is, a single claim. Thus, this claim should be allowed in full, rather than allowed only in part and, without justification, rejected in part. The Courts below did not attempt to justify this completely different treatment of the two parts of this single claim, and, claimant submits, there is no justification in law or in fact for this unfair discrimination between its claims. Accordingly, the claim of Hoos & Co. should be recognized as a single, unified claim and allowed in full.

II

EVEN IF VIEWED AS A SEPARATE
DOCUMENT, THE SEPTEMBER 8
LETTER CONSTITUTES A VALID,
TIMELY CLAIM

Bankruptcy Rule 301(a) -- made applicable to Chapter XI cases by Rule 11-33(a) -- provides that a proof of claim "shall consist of a statement in writing setting forth a creditor's claim . . . shall be executed by the creditor or by his authorized agent", and "shall conform substantially to Official Form No. 15". Mr. Lipp's September 8, 1972 letter (Ex. A) was precisely such a written statement of the creditor's claim, specifying its basis and extent. Further, Mr. Lipp, as a partner of Hoos & Co., had full authority to file a claim to the Carrier notes registered to Hoos & Co.*

The District Court recognized that under the prior decisions of this Court,** the Lipp letter was sufficient

* As described in paragraph 6 of the Lipp affidavit (a-8-9), he then believed, mistakenly but in good faith, that the notes had been re-registered in the nominee of Marine Midland Bank-Central, Carsec & Co. This mistaken, good faith belief could, however, in no way diminish his substantive authority to execute a claim on behalf of Hoos & Co.

** See In re Gibraltar Amusements Ltd., 315 F. 2d 210 (2d Cir. 1963), where a letter from a bank, stating the amount and basis of its claim, was found sufficient

(Footnote continued on next page)

in form to constitute a proof of claim. (a-123) But while refusing to accept the Bankruptcy Court's conclusion that the Lipp letter (Exhibit A) was insufficient in form, the District Court determined that delivery of this valid claim "did not constitute a filing within the meaning of Bankruptcy Rule 509(c), more particularly, within subsection (c) of this rule". (a-123-24) In this conclusion, the District Court relied on a literal and inflexible view of the rule, finding that "Mr. Tulchin, as secretary of the Creditors' Committee, does not come within the language of this section as one of the named individuals to whom delivery of a proof of claim may be deemed a valid filing." (a-124) The Court discounted -- to the point of negating -- the fact that Mr. Tulchin had solicited and received the claim for transmittal

(Footnote cont'd)

to constitute a proof of claim in substance, permitting its formal amendment after the statutory period for filing had expired; and In re High Point Seating Co., 181 F.2d 747 (2d Cir. 1950), in which a letter to an accounting firm retained by the debtor in a Chapter XI proceeding, was found to be sufficient in substance as proof of claim, and its formal correction allowed after the time for filing has expired. See also Conway v. Union Bank of Switzerland, 204 F.2d 603 (2d Cir.) petition for writ of certiorari dismissed per stipulation Silesion Holding Company v. Union Bank of Switzerland, 350 U.S. 978 (1956), where Judge Learned Hand concluded: "[e]ver since Hutchinson v. Otis, Wilcox & Co., 190 U.S. 552 (1903), it has been common-place in bankruptcy that a claim may be amended to conform to the required formalities, provided the 'cause of action' is the same, and this Circuit has been especially liberal in applying the doctrine.", 214 F.2d at 606, n. 4.

to the Court (a-125), finding that such activities "were perfectly proper as a 'function in the interests of creditors'" but that such receipt and filing of claims "was a courtesy on behalf of the creditors and not a duty."

This conclusion -- that Rule 509(c) cannot apply to a claim with respect to a registered and scheduled debt, where the claim is submitted to the Secretary of the Creditors Committee in response to a representation that the claim will be delivered to the Court -- is clearly erroneous for the following reasons: (a) it fails to consider Rule 509(c) in light of its predecessor provision, as construed by the Supreme Court and this Court, and thus erroneously construes Rule 509(c) as prescribing inflexible limits for the exercise of the Court's equitable authority; (b) it fails to consider whether, in light of the standards and policy of section 355 of the Bankruptcy Act, that section is properly applicable to bar a claim filed with respect to a registered debt security; (c) it fails properly to evaluate the complete absence of equity in the debtor's opposition to allowance of the claim in question.

A. Rule 509(c) Must be Understood in
Light of the History of its Pre-
decessor Provision, As Interpreted
by the Supreme Court and by this Court

Under Bankruptcy Rule 509(a), after reference all papers in the case, including proofs of claim "shall be filed

with the referee unless otherwise directed by local rule or by order of the judge." Rule 509(c) further provides:

"(c) Error in Filing. A paper intended to be filed but erroneously delivered to the trustee or receiver, or the attorney for either of them, or to the district judge, referee or clerk of the district court, shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the proper person. In the interest of justice, the court may order that the paper shall be deemed filed as of the date of its original delivery."*

Substantial authority construing General Order 21(1) (the predecessor to Rule 509(c)) indicates that the equitable authority of the Bankruptcy Court to determine the validity of the form and manner of filing of a claim is determined in light of the totality of facts and equities in each case, and is not inflexibly limited by a single formula or rule. Thus, in J.B. Orcut Co. v. Green, 204 U.S. 96 (1907),

* As the Advisory Committee note to Rule 509(c) explains:

By subdivision (c), when a paper to be filed is misdelivered to one of a number of persons connected with a bankruptcy case or the bankruptcy court, the recipient is charged with the duty of transmitting the paper to the proper person. If not contrary to the interest of justice the erroneous delivery may be deemed by the court to be the equivalent of a proper filing. This subdivision is new, but it is an extension of the rule of practice prescribed in the last sentence of General Order 21(1) respecting proofs of claim delivered to the Trustee. See 3 Collier § 57.10 (1961).

a unanimous court, in construing § 57(n)* of the Bankruptcy Act in connection with General Order 21,** determined that where "in reality" proofs of claim were "presented and delivered to the trustee in bankruptcy before the expiration of one year after adjudication [the time limit imposed by § 57(n)], but there was no actual filing of the claims with the referee until after the expiration of that time", such a filing was timely under the Act and Rules. 204 U.S. at 100.

The equitable authority to determine the validity of the filing of particular claims recognized in J.B. Orcutt, supra, was applied by Judge Sugarman in In re Oscillation Therapy Products Inc., 94 F.Supp. 779 (S.D.N.Y. 1951).

Before bankruptcy, five creditors consulted an attorney regarding sums due to them and were advised to file a petition against the bankrupt. Thereafter, the five creditors presented statements of their claims to the attorney and paid him to file an involuntary petition which was signed by two of the five. At the first meeting of creditors, where the attorney was appointed trustee of the estate,

* Section 57(n) provided: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

** General Order 21(1) provided in pertinent part: "Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred."

he had in his possession a number of proofs of claim, including the five referred to above. He thereafter filed certain proofs of claim with the referee, believing that they included all in his possession. Through inadvertence he neglected to then deliver the five claims to the referee and these claims remained unknown to him until their discovery in January 1950. On February 27, 1950 he delivered these five claims to the referee, long after the expiration on October 27, 1948 of the statutory six months period.

In reversing the referee's determination that three of the claims in question had not been filed "within the time or within the manner provided in Section 57 of the Bankruptcy Act",* Judge Sugarman relied on J.B. Orcutt as determining that "a proof of debt (except that of the trustee himself) could be validly filed with the trustee and that the creditor thus filing it could not be prejudiced by the trustee's failure to comply with the requirement of General Order 21 that he, having received it, deliver it to the referee." 94 F.Supp. at 781. The Court further noted that the holding in J.B. Orcutt Co. v. Green "rests entirely upon General Order 21 for, admittedly, there is nothing in the

* The referee had allowed the claims of 2 creditors who signed the involuntary petition.

Bankruptcy Act indicating valid filing with a trustee.**

Ibid.

In avoiding an unjust denial of the claims in question, the Court in Oscillation Therapy Products appropriately expanded the scope of a valid filing under General Order 21, concluding that a valid filing had occurred when claims were delivered to the attorney before his designation as trustee, finding "no justification" for reading into General Order 21 a requirement that the claim "be received by the trustee after his appointment." 94 F.Supp. at 782, emphasis added. (See also In re P. Derby Co., 18 F. Supp. 995 (D. Mass 937).)

The validity of the delivery of the claims to the Secretary of the Creditors Committee (Mr. Tulchin) in September 1972 is further confirmed by the opinion of Judge Augustus Hand for a unanimous Court (Judges Clark and Frank concurring) in In re High Point Seating Co., supra, 181 F.2d 747, where a written claim (not on an official form) was presented to the auditors appointed by the court to collocate the indebtedness of the High Point Seating Company. Upon the basis of this writing by the creditor, the report of the auditors set forth the claim and the report was filed by the auditors with

* As stated by the Advisory Committee note, Rule 509(c) "is an extension of the rule of practice prescribed in the last sentence of general order 21(1) respecting proofs of claim delivered to the trustee." See 3 Collier § 57.10 (1961)

the Referee. 181 F.2d at 748.* Even though the auditors were not designated to transmit claims to the Referee, and though the writing submitted to the auditors was itself never filed with the Referee, the claim based upon this writing was allowed.

In contrast, the facts supporting allowance here are stronger, since Mr. Tulchin appropriately solicited claims for transmittal to the Referee, Mr. Lipp reasonably relied on his authority to do so in submitting his claim to Mr. Tulchin, and the claim thus transmitted has, in part, already been allowed and paid. (Findings of Fact, par. 7, 19 (a-108, 111)).

Contrary to the substantive precedent considered above, the District Court (a-123) affirmed the Bankruptcy Court's ruling (a-112) that the filing of the Lipp letter with the Secretary of Creditors Committee -- at the request of the Secretary -- did not constitute a filing with a person "authorized to receive and forward claims" under Bankruptcy Rule 509(c). This conclusion disregards the undisputed facts that Mr. Tulchin represented that he was authorized (and in fact was authorized) to solicit and

* Note that here, the debtor's schedule filed on October 5, 1972 (a-38) included the \$200,000 principal amount of the notes identified by the Lipp letter of September 8. In High Point, the claim in question was inadvertently omitted from the debtor's schedule.

receive claims for transmittal to the Referee, and that he performed this function for the benefit of the Court and creditors (a-13, 38). This function is clearly appropriate under Rule 11-29, which provides that the Creditors Committee, in addition to certain enumerated functions, may "perform such other services as may be in the interest of creditors."

Further, even if the letter and accompanying form are not viewed as a unified claim, the authority of the Committee Secretary to receive and forward claims has been conceded by the allowance of the claim to \$300,000 of such notes which was transmitted with the Lipp letter to Mr. Tulchin and filed with the Court. The Court below necessarily admitted Mr. Tulchin's authority to receive the claim with regard to \$300,000 of the notes, but, at the same time, denied his authority to receive the \$200,000 claim which accompanied it.

This anomalous conception of Mr. Tulchin's authority only highlights the fundamental error of the District Court in concluding that Rule 509(c), because of its failure to specifically identify the Secretary of the Creditors Committee, imposes an inflexible limit on the Court's equitable authority in circumstances where, as here, the Secretary has solicited claims for filing with the Court, and the appropriateness of his actions are confirmed by the filing and allowance of claims so solicited. This view of Rule 509(c) as inflexibly

constricting the equitable authority of the Court is in direct conflict with the equitable principles which (as reviewed above) have long been recognized by this Court.

B. The District Court Improperly
Failed to Consider the Direct
Bearing of the Policies of Sec-
tion 355 on its Exercise of
Equitable Authority

The District Court's erroneous conception of its equitable authority is directly reflected in its failure to recognize that the requirement for filing claims under Section 355 of the Bankruptcy Act should not be applied to bar the present claim with respect to a registered debt security.

Section 355 of the Bankruptcy Act, from which Rule 11-33 is derived, provides that, with certain exceptions, "creditors . . . shall file their proofs of claim before confirmation" Prior to 1963, it was not necessary that creditors file a claim to participate in a Chapter XI arrangement. "Creditors were paid on the basis of the Debtor's schedules." (Herzog, Bankruptcy Act and Rules ("Herzog"), Comment, section 355, p. 399) The Judicial Conference of the United States concluded, however, "that such system was open to abuse," noting that "a debtor in possession of his own business and who desired to remain on good terms with a supplier might inflate the amount of

the supplier's claim. There are, of course, many other possible motivations for intentional inaccuracies, and in addition to intentional inaccuracies a debtor through lax accounting methods may not know his creditor situation." (Herzog, Comment, section 355, p. 399)

The 1963 amendment of section 355 thus required that creditors file claims in a Chapter XI proceeding within 6 months of the filing of the debtor's petition. Because of difficulties occasioned by the 6 month limitation, the present section 355 was amended in 1967 to provide that (with certain exceptions) all claims must be filed before confirmation. The principal purpose of this 1967 amendment, in extending the applicable time limitation, was "to protect creditors listed on the debtor's schedule who failed to file their claims within the specified period and thus prevent the debtor from obtaining an undeserved windfall." (Herzog, Comment, section 355, p. 401, citing House Report No. 122 and Senate Report 751, 90th Cong., 1st Sess. (1967)).

While section 355 (as implemented by Rule 11-33) requires the filing of a claim in a Chapter XI proceeding, the section's legislative history indicates no intention to restrict the equitable authority of the Bankruptcy Court to determine the sufficiency of the form and manner of delivery of a particular claim.

As shown by its legislative history, the amendment of section 355, in introducing a filing requirement, was never intended to preclude allowance of the kind of claim at issue in this case. The rationale of this amendment -- to prevent intentional abuse or inadvertent inaccuracies in the debtor's accounts -- would have no application to a registered debt security of the debtor -- which is the basis of Hoos & Co.'s claim with respect to the Carrier notes. In fact, the legislative history makes clear that the present section 355 was intended "to protect creditors listed on the debtor's schedules who failed to file their claims within the specified period and thus prevent the debtor from obtaining an undeserved windfall." (Herzog, Comment, section 355, p. 401, emphasis added.)

In short, the pertinent history of section 355, and the substantial authority in this Circuit affirming the equitable authority of the Court to determine the validity of the filing of particular claims, establish that Rule 509(c) should not be read to exclude the allowance of the claim with respect to the registered, scheduled notes involved in this case.

C. The District Court Failed to Properly Evaluate the Substantial Lack of Equity in the Debtor's Opposition to Payment of the Claim At Issue

Having avoided under its plan of arrangement the repayment of 71-1/2% principal amount of an acknowledged \$200,000 debt, the debtor's present position is an attempt, on technical and insubstantial grounds, to avoid even the 28-1/2% payment provided by its plan. The District Court was completely mistaken in attributing any equity to the debtor's opposition to payment of this limited amount.

The conspicuous lack of equity in the debtor's position is particularly indicated by the debtor's disregard, and apparent suppression, of material evidence concerning the disputed claim which was provided by its Court-appointed auditors prior to the confirmation of its plan.

It is undisputed that in March, 1974, Marine Midland-New York, in response to the request of debtor, advised the debtor's court-appointed auditors that its nominees then held \$300,000 of the debtor's notes.* However, at the time of that response, the schedules of the

* This response was accurate in light of Marine Midland's current knowledge, since more than 6 months before, the assets of the Carrier Trust, including the \$200,000 of notes here in issue, had been transferred to Bankers Trust as successor trustee (a-109). However, because of Banker's inability to re-register the \$200,000 of notes, they remained registered in Marine's nominee Hoos & Co. (a-110).

debtor indicated that Marine Midland's nominees held \$500,000 of such notes. As specifically found by the Bankruptcy Court -- "[n]either S.D. Leidesdorf [the court appointed auditor] nor the debtor advised Marine Midland-New York of this discrepancy." (Findings of Fact, par. 17 (a-111)).

In view of this specific finding of the Bankruptcy Court, the District Court erroneously considered, as an equity favoring disallowance, the "reliance by the debtor as to the amount of debt filed in the proofs of claim in planning a reorganization such as here achieved." (a-126) This finding of reliance, which disregards the fact that the notes in question were at all times scheduled in the arrangement proceeding, also is in direct conflict with the Bankruptcy Court's finding that, although aware of the \$200,000 discrepancy with respect to the notes registered in Hoos & Co., neither the Court-appointed auditor nor the debtor advised Marine Midland of this fact (a-110-11).

Since the debtor failed to provide for the regular re-registration of its negotiable notes during the period of its protection under Chapter XI, and since it was specifically made aware of an obvious discrepancy with respect to the registration of the specific notes at issue on this appeal, the debtor should not be entitled to claim (in contradiction of the facts) that it relied in any way on the failure to

file a claim with respect to the notes in question. Bankers Trust has asserted, without contradiction by the debtor, that because of its inability to register the notes in question, it did not receive notice in November 1974, as successor Trustee of the Carrier Trust, of the December 1974 deadline for filing proofs of claim (a-10-11). Under these circumstances, disallowance of the present claim serves only to unjustly penalize the beneficial holder of the notes, while permitting the debtor to benefit from its own neglect, and knowing disregard of evidence indicating such neglect.

Conclusion

The Bankruptcy Court (and the District Court as well) failed to address claimant's central contention -- that the letter and proof of claim together constituted a unified claim to \$500,000 of the debtor's notes, which without justification has been allowed only in part. The undisputed facts indicate that the claim was a single, unified claim, and on this basis it should be allowed in full.

Further, while the District Court correctly disapproved the Bankruptcy Court's finding with respect to the formal sufficiency of the September 8, 1972 letter, it relied on an erroneously restricted view of its equitable authority under Bankruptcy Rule 509(c), in determining that

the transmittal of the letter to the Secretary of the Creditors Committee, for filing with the Court, did not constitute a valid, timely filing.

For each of these reasons, the order of the District Court should be reversed and the application of Hoos & Co. for allowance of its claim should be granted.

Dated: New York, New York
August 16, 1977

Respectfully submitted,

SULLIVAN & CROMWELL
Attorneys for Claimant-Appellant
Hoos & Co.

48 Wall Street
New York, New York 10005

(212) 952-8100

David B. Rigney

Of Counsel.

Exhibit A

2

September 8, 1972

Mr. Stanley Tulchin, Secretary
Creditors' Committee
Stanley Tulchin Associates
350 Fifth Avenue
New York, New York 10001

Re: Dynamics Corporation of America
72 B 750

Dear Mr. Tulchin:

I am returning herewith our Bank's Proof of Claim with regard to our holding of Dynamics Corp. of America 7½% notes due 9/1/88 of which \$200,000 is held in our nominee name of Hoos and Co. while an additional \$100,000 is held in our nominee name of Jaquith & Co.

These notes are held in our capacity as Trustee or Custodian for various Pension funds. However, earlier this year we had held an additional \$200,000 which was transferred to a successor trustee, namely, Marine Midland Bank-Central, and are presently in their nominee of Carsec & Co. I am not a partner of Carsec & Co. but would appreciate your including this claim with ours, since the timing of your meeting Monday does not make it possible to get you their Proof of Claim.

Please include the following on your subsequent mailings: Mr. Ronald S. Hummel, Vice President, Marine Midland Bank-Central, 344 South Warren Street, Syracuse, New York 13201.

If you have any questions, please do not hesitate to call.

Sincerely,


Theodore J. Lipp
Pension Trust Officer

/bm

~~No 72-B-750~~

STATE OF *New York* } ss.
COUNTY OF *New York*

1. (c) INDIVIDUAL

That he hereinafter designates himself as claimant (or as appears below).

(b) CO-PARTNERSHIP

That he is a member of SAQUITA, a co-partnership of No. 10015 hereinafter designated as claimant (or as appears below)

(c) CORPORATION

That he is the _____ of _____ and is a corporation organized and existing under the laws of the State of _____ and is duly authorized to make this proof of claim on its behalf. Said corporation is hereinafter designated as the claimant.

2. That the above named debtors was as and before the filing by said debtor of the petition for an arrangement and still is justly and truly indebted (or liable) to claimants in the sum of \$ 200,000.00 (Two Hundred Thousand and 00/100 Dollars) and no more.

3. That the consideration of said debt (or liability) is as follows: Goods, ware, and merchandise sold and delivered to the said debtor at the special instance and request of said debtor at the agreed price set forth in the annexed statement which is made a part hereof.

4. That no part of said debt (or liability) has been paid. That there are no set-offs or counterclaims to said debt. That claims of _____ are not valid, and has not, nor has any person by his order, or to deponent's knowledge or belief for its use had or received any security or securities for said debt (or liability). That the instruments upon which said debt is founded is attached hereto. That no note or other negotiable instrument has been received for such account or any part thereof ((or that the said debt is evidenced by a note (or other negotiable instrument), which is attached hereto)); that no judgment has been rendered thereon.

To: A Creditors' Committee of which Alex H. Ardrey, Jr. is Chairman, Stanley Tulchin is Secretary and Levin & Weintraub and Otterbourg, Steindler, Houston & Rosen, are Co-Counsel.

The undersigned does hereby authorize you, or any one of you, with full power of substitution, to attend all meetings of creditors of the debtor aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for the undersigned and in the name of the undersigned, to vote for or against any proposal or resolution that may be then submitted under the Act of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of the said debtor and for a committee of creditors, and to do all and sundry acts, to execute all powers and to perform all duties that may be required of you, or any one of you, in connection with the administration of the estate of the said debtor, and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

IN WITNESS WHEREOF the undersigned has hereunto signed his name and affixed his seal the
2nd day of September, 1976

Sworn to before me this 7th day of Feb., 1905, said subscriber being known to me to be the person described in and who signed and swore to the above instruments and duly acknowledged that he executed them and was authorized to execute them.

Sign name of individual, partner or officer here

Notary Public

Sign name of firm here

Corporation and deal here

NOTE Annex statement in this proof showing amounts, date and year of sale of goods or services rendered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

In the Matter of DYNAMICS CORPORATION :
OF AMERICA,

Debtor. :

(No. 72 B 750) :

- - - - - x

Docket No.
77-5015

HOOS & CO., :

Claimant-Appellant, :

vs. :

DYNAMICS CORPORATION OF AMERICA, :

Debtor-Appellee. :

- - - - - x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. SCHLIP, being duly sworn, deposes and
says that she is over the age of twenty-one years; that she
is employed by the firm of Sullivan & Cromwell, attorneys
for Claimant-Appellant Hoos & Co.; that on the 17th day of
August, 1977 she served the within Brief upon Krause, Hirsch
& Gross, attorneys for Debtor by depositing two true copies
of the same securely enclosed in a postpaid wrapper in the
Post Office Box regularly maintained by the United States
Government at 48 Wall Street, Borough of Manhattan, City and

State of New York, directed to said attorneys at 41 East
42nd Street, New York, N.Y. 10017, that being the address
within the state designated by them for that purpose upon
the preceding papers in this action.

Barth M. Schlip

Sworn to before me this
17th day of August, 1977

Anthony A. Silvestri
Notary Public

ANTHONY A. SILVESTRI
NOTARY PUBLIC, State of New York
Co. Clk's No. 31-4609678
Qualified in New York County
Commission Expires March 30, 1979